United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/930
15 November 1999

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 930

Case No. 1002: KHAWAJA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, First Vice-President, presiding; Mr. Julio Barboza, Second Vice-President; Mr. Chittharanjan Felix Amerasinghe;

Whereas, on 13 August and 13 December 1997, Sarfraz Hussain Khawaja, a former staff member of United Nations Children's Fund (hereinafter referred to as "UNICEF" or "the Agency"), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 24 January 1998, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal to order:

"(i) [Rescission of the] decision not to give me the permanent appointment after the completion of four years on October 30, 1994.

(ii) Reinstatement of the Applicant to his post retroactively with full entitlement including salary."

Whereas the Respondent filed his answer on 25 March 1999;

Whereas the Applicant filed written observations on 15 June 1999;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 1 November 1990, on a two-year fixed-term appointment, as Planning and Evaluation Officer, at the NO-C level, in Islamabad, Pakistan. On 1 November 1992, his appointment was extended for two more years. On 10 April 1994, the Applicant was assigned to the post of Programme Officer, Education. On 1 November 1994, his appointment was extended for one month, and he separated from service on 30 November 1994.

On 14 October 1990, the UNICEF Representative, Country Office Islamabad, wrote to the Applicant, who then held a government post in the Academy of Education Planning and Management (AEPAM), Ministry of Education, Government of Pakistan, and offered him a two-year fixed-term appointment post with UNICEF as Planning and Evaluation Officer. The UNICEF Representative requested the Applicant to submit to UNICEF a "Letter of Secondment" from his employer.

On 28 October 1990, the Applicant accepted UNICEF's offer and transmitted a letter from AEPAM indicating that the Applicant was being granted "two years leave extraordinary" to join UNICEF. On 1 November 1990, the Applicant signed a letter of appointment for a 24-month period.

On 15 September 1992, UNICEF approved an extension of the Applicant's appointment for a further period of two years. On 22 October 1992, AEPAM issued an order granting the Applicant leave for a further period of two years, from 1 November 1992 to 31 October 1994, and the Applicant subsequently signed a letter of appointment for the period 1 November 1992 to 31 October 1994.

On 3 October 1994, the Senior Programme Planning Officer, UNICEF, Islamabad, recommended that the Applicant be granted a permanent appointment.

On 15 October 1994, the Applicant wrote to the Secretary, Ministry of Education, Government of Pakistan, and stated "I expect that UNICEF will renew my existing contract

for few more years" and requested official to "grant [him] Extra-Ordinary Leave for a period of five years with effect from November 1, 1994 ..." On 27 October 1994, AEPAM issued an "Office Order" to the Applicant, which was copied to the UNICEF Representative, informing the Applicant that his leave would expire on 31 October 1994 and directing him to report for duty at AEPAM on 1 November 1994. On 1 November 1994, the Applicant signed a letter of appointment for the period 1 November 1994 to 30 November 1994.

On 16 November 1994, the Appointment and Placement Committee (APC), UNICEF, Islamabad, discussed the recommendation for conversion of the Applicant's fixed-term appointment to permanent. The APC recommended that the Applicant be released from his service with UNICEF "in order to obey ... the request from the Pakistani Government that he should resume his duty with [AEPAM]" and that he return to service with the Ministry of Education.

On 28 November 1994, the UNICEF Representative informed the Applicant that he had approved the APC's recommendation. He stated that "non-renewal of [his] contract [was] in [his] own best interests as well as those of UNICEF" as he did not "foresee the possibility of [his] long-term association with UNICEF, and sincerely believe[d] that [his] future career possibilities [lay] with [his] continued government service." Finally, while noting that a fixed-term contract normally ends automatically, the UNICEF Representative informed the Applicant that he would be granted the equivalent of one month's salary in lieu of notice, along with any other payments to which he was entitled under the Staff Rules.

On 6 December 1994, the Director General, AEPAM, wrote to the Applicant, informing him that "the Ministry of Education will have no objection to giving you leave for a period of three years in case you are acceptable to UNICEF." Also on 6 December 1994, the Applicant wrote to the UNICEF Representative, transmitting a copy of the Director General's letter, and explaining that, in view of AEPAM's letter, he had not returned to his service with the Government of Pakistan and wished to continue service with UNICEF. On 14 December

1994, the UNICEF Representative informed the Applicant that the decision on non-renewal of his contract had "already been taken" and encouraged him to return to service with AEPAM.

On 16 December 1994, the Applicant wrote a letter to the Executive Director of UNICEF requesting administrative review of the decision not to renew his fixed term appointment. The Deputy Director, Human Resources Administration, replied on 31 January 1995 informing the Applicant that administrative review of the decision would be conducted and that if he did not receive a decision within two months, he could file an appeal with the Joint Appeals Board (JAB).

On 29 March 1995, the Applicant lodged an appeal with the JAB.

The JAB adopted its report on 23 April 1997. Its conclusions and recommendations read as follows:

> "***Conclusions and recommendations***
>
> 44. Based on the foregoing, the majority members of the Panel *agreed* that there was no evidence that the decision not to consider the recommendation for conversion of the Appellant's fixed-term appointment to permanent was based on either of the two documents referred to by the Appellant, which he claimed contained false information.
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> 45. The Panel *unanimously agreed* that the Appellant was not on genuine secondment from the Government of Pakistan during the period of his service with UNICEF, Islamabad, and that in so far as the Respondent relied upon the Office Order of the Government of Pakistan directing the Appellant to report to government duty, the decision not to consider the recommendation for conversion of the Appellant's fixed-term appointment to permanent was tainted by extraneous factors.
>
> 46. The majority of the Panel *agreed* that the Appellant had a legitimate expectation that the recommendation for conversion of his fixed-term appointment to permanent would receive fair and full consideration by the appropriate promotion bodies, and the refusal of the APC, UNICEF, Islamabad, to accord the Appellant such consideration was a violation of his legitimate expectation.

47. The majority members of the Panel *recommend*, in view of the findings in paragraphs 40 and 43 *supra*, that the Appellant be compensated and paid the equivalent of three months of his net base salary, representing the period between his separation from UNICEF on 30 November 1994 and his return to government service with AEPAM on 31 January 1995.

48. The majority members of the Panel *decided* to make no further recommendation in support of the appeal."

One JAB member filed a dissenting opinion, which read, *inter alia*, as follows:

"...

2. I concur with the finding of the majority members of the Panel that the Appellant was not on genuine secondment from the Government of Pakistan during the period of his service with UNICEF, Islamabad, and that in so far as the Respondent relied upon the Office Order of the Government of Pakistan directing the Appellant to report to government duty following his second two-year appointment with UNICEF, the decision not to renew the Appellant's fixed-term appointment was tainted by extraneous factors.

3. I am of the view, however, that the Appellant had no legal expectancy of continued employment with the Organization; accordingly, he is not entitled to any compensation.

4. I am of the view, also, that as the offer of UNICEF to the Appellant was conditioned on his securing leave of absence from his employer, the Government of Pakistan, which condition was contained in the two previous offers made to him, and which he complied with, the Appellant was obliged to either obtain leave of absence from the Government of Pakistan, or resign his post as Director of AEPAM, before he could accept any offer of appointment from UNICEF. The Government of Pakistan having refused to grant the Appellant leave of absence beyond 31 October 1994 and the Appellant having not resigned his post as Director of AEPAM, the decision by the Respondent not to renew the fixed-term appointment of the Applicant was a proper exercise of the discretionary power of the Respondent regarding staff appointment."

On 21 July 1997, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

> "...
>
> The Secretary-General has considered your case in the light of the Board's report. He has taken note of the Board's conclusion that there was no evidence that the decision not to consider the recommendation for conversion of your fixed-term appointment to permanent was based on either of the two documents referred to by you, which you claimed contained false information. He has taken note of the Board's conclusion that you were not on genuine secondment from the Government of Pakistan during the period of your service with UNICEF and that in so far as the Respondent relied upon the Office Order of the Government of Pakistan directing you to report to government duty, the decision not to consider the recommendation for conversion of your fixed-term appointment to permanent was tainted by extraneous factors. The Secretary-General has also taken note of the Board's conclusion that you had a legitimate expectation that the recommendation for conversion would receive full and fair consideration and that the refusal to accord you such consideration was a violation of this legitimate expectation; it is hereby pointed out, however, that you had no legal expectancy of continued employment with the Organization.
>
> Finally, the Secretary-General has noted the Board's recommendation that, in view of the findings, you be compensated an amount equivalent to three months of your net base salary, and has decided to accept this recommendation and to take no further action regarding your case.
>
> ..."

On 24 January 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was entitled to a conversion to a permanent appointment based on his good performance over four years and the recommendation of his supervisor. The

APC acted unfairly by not recommending the conversion of the Applicant's appointment, and the Respondent relied on false and prejudicial information in deciding not to grant the Applicant a permanent appointment.

2. The Applicant's contract should have been renewed, as he was not on secondment status from his government, as the Respondent claims.

Whereas the Respondent's principal contentions are:

1. The Applicant had neither the right under his fixed-term appointment nor the legal expectancy of continued employment with UNICEF.

2. The Respondent's award of monetary compensation in this case was a proper remedy and fully consistent with the Tribunal's jurisprudence.

The Tribunal, having deliberated in Geneva on 9 July 1999, and from 29 October to 15 November 1999 in New York, now pronounces the following judgement:

I. The Applicant's case is based on the determination by the JAB that "the decision [of the Respondent] not to consider the recommendation for conversion of the Appellant's fixed-term appointment to permanent was tainted by extraneous factors", i.e. the Respondent's reliance upon the "Office Order of the Government of Pakistan directing the Appellant to report to government duty". Consequently, the Applicant alleges that his "legitimate expectation that the recommendation for conversion of his fixed-term appointment to permanent would receive full and careful consideration by the appropriate appointment and promotion body(ies)" was not satisfied.

II. In other words, the Applicant alleges that due to its belief that there existed among

the three parties concerned (the Agency, the Government of Pakistan and the Applicant) a secondment contract, the APC, in 1994, felt barred from considering the substance of the request for conversion to a permanent appointment.

III. The Tribunal does not believe that this was the case. In any event, the situation was as follows: at the end of his second fixed-term contract, the Chief Operations Section, UNICEF, Islamabad, recommended that the Applicant should be granted a permanent appointment. Staff rule 104.12, on which the Applicant appears to rely in his pleas, does not give him the right to be considered for a permanent appointment before five complete years of service have elapsed. In other words, at the end of his second fixed term contract, i.e. by 1 November 1994, he did not have a right to the "full and careful consideration" of his request that he seeks, since he obviously had not yet completed the period of service required by staff rule 104.12 (b) (iii). Actually, at the time of the Applicant's first appointment in 1990, the APC rejected another candidate who "was disqualified ... [for] not having completed five years at his present post, although this criterion can be waived in exceptional circumstances which [that candidate] did not meet at this stage."

Since the recommendation that the Applicant receive a permanent appointment was made prior to his having served five years, the APC, in 1994, had only to consider whether or not the Applicant should be appointed to a new fixed-term contract and they decided against that possibility. The Applicant did not have any right to expect a new fixed-term appointment after the expiration of his second term. That is well established. Staff rule 104.12 (b) (ii) states that "[t]he fixed-term appointment does not carry any expectancy of renewal or conversion to any other type of appointment". Staff rule 109.7 states that "[a] temporary appointment for a fixed term shall expire automatically and without prior notice on the expiration date specified in the letter of appointment". (Cf. Judgements No. 440, *Shankar* (1989); No. 647, *Pereyra* (1991); and No. 795, *El-Sharkawi* (1996)).

IV. The Tribunal is satisfied that these arguments would be sufficient to reject the application entirely. However, even though the APC did not have an obligation to do so, there is a clear indication that it did in fact give "full and careful consideration" to the continuation of the Applicant's service. Its report states that "[it] reviewed the extensive documentation presented. After the discussions, there had been a wide consensus on the release of [the Applicant] from his service with UNICEF in order to obey with [sic] the request from the Pakistani Government, that he should resume his duty with the Academy of Education, Planning and Management as of 1st November, 1994".

V. The JAB interpreted this statement by the APC to mean that the APC had erroneously considered that, due to a presumed contract of secondment that was not even mentioned in the cited paragraph, the APC was barred from the possibility of even considering the Applicant for a permanent position. Based on this belief, the JAB proceeded to conclude that, since there was actually no formal secondment, full and careful consideration had not in fact been given to the Applicant with a view to a permanent appointment.

VI. This conclusion by the JAB was erroneous. The APC examined extensive documentation submitted and held discussions on the matter of the Applicant's situation, after which they agreed that the Applicant should return to his former post with the Government of Pakistan. This, of course, implies that the APC did not support the recommendation that he receive a permanent appointment. This recommendation by the APC need not to have been based on a formal contract of secondment, irrespective of how close to a secondment the arrangement between the three concerned parties was. The Tribunal is satisfied that the APC simply wanted to respect the wishes of the Government of Pakistan, in view of the understanding reached by the three parties.

VII. The Applicant was a Director in AEPAM. This institution had indicated it wanted the return of the Applicant's services. Whether or not the communications exchanged and the understanding reached among UNICEF, AEPAM and the Applicant constituted a formal contract of secondment is not the issue. The APC was authorized to find that there was an understanding with the Government of Pakistan which UNICEF ought to respect. Staff rule 104.12 (b) (iii) states in its final sentence that "a staff member ... will be given every reasonable consideration for a permanent appointment, *taking into account all the interests of the Organization*" (emphasis added). That is to say that among the necessary considerations within the "every reasonable consideration" to be granted to staff members seeking permanent appointments are "*all the interests of the Organization*". Naturally prominent amongst these would be that of respecting the understanding established with the Government of Pakistan to the effect that the Applicant would return to his service for that government.

VIII. The Tribunal is of the opinion that such an understanding was clearly established. In the APC minute of 6 September 1990, there is added an unsigned a note in long hand saying: "please arrange for the secondment of [the Applicant] for the ... period of two years from the Government. If [the Applicant] is not available, I would like to interview [another candidate] before offering an appointment".

The Applicant, in accepting UNICEF's offer by his letter of 28 October 1990, submitted what he called, "the letter of secondment from [his] employer". It is clear from that letter that (a) the Applicant had been authorized to apply for the UNICEF position, and (b) that the Federal Education Secretary of the Government of Pakistan had allowed him "two years leave extraordinary" to join UNICEF in the position of Planning and Evaluation Officer. So, there seems to have been an understanding among the three parties concerned, to the effect that after two years, the Applicant was expected to return to service with the Government of Pakistan in AEPAM. That period was extended at its expiration for a further

two years, subject to the same conditions, until finally the Applicant's request for five more years of leave from AEPAM was denied. That last decision was copied to the UNICEF Representative, obviously to let him know of the position of the Government of Pakistan. It was proper for the Administration to take the position that it would respect the understanding with the Government of Pakistan.

IX. The Tribunal finds that the Respondent did not take into account extraneous considerations in refusing to keep the Applicant in his employment nor did he otherwise treat the Applicant unfairly.

X. For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Mayer GABAY
First Vice-President, presiding

Julio BARBOZA
Second Vice-President

Chittharanjan Felix AMERASINGHE
Member

New York, 15 November 1999

Maritza STRUYVENBERG
Executive Secretary